# STATE OF MICHIGAN

# COURT OF APPEALS

KIMBERLY BETZOLD,

Plaintiff-Appellant,

v

SAGINAW COOPERATIVE HOSPITALS,

Defendant-Appellee.

UNPUBLISHED
February 15, 2005

No. 251258
Saginaw Circuit Court
LC No. 01-041064-NZ

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this employment action. We affirm.

Plaintiff was employed with defendant from 1973 until 1999, when the psychiatry department she worked in was closed. During her employment, she applied for a physician recruiter position and a social worker position. Defendant hired a younger male from outside the hospital for the physician recruiter position and a younger female from outside the hospital for the social worker position. Plaintiff filed this suit claiming age and gender discrimination, under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*, in the failure to hire her for either position and in her termination, wrongful discharge, and a violation of the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*.

Plaintiff first argues that the trial court erred in finding that she failed to meet her burden of showing that gender or age was a determining factor in defendant's decision not to offer plaintiff the physician recruiter or a social worker position. We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

A plaintiff may prove a disparate treatment case of discrimination by either direct evidence of discrimination or indirect or circumstantial evidence of discrimination. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). To prove a case with indirect evidence, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133-134. Although this test was originally used in racial discrimination cases, the approach has been adopted and used in age and gender

discrimination cases brought under the CRA. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001).

Under *McDonnell Douglas*, a plaintiff can establish a prima facie case of discriminatory intent by showing: (1) the plaintiff was a member of a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the employment position, and (4) the plaintiff's failure to obtain the position gives rise to an inference of unlawful discrimination on the part of the defendant. *Hazle, supra* at 463. Once a plaintiff presents a prima facie case of discrimination and establishes a rebuttable presumption of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 464. This articulation requirement means that the defendant has the burden of producing evidence that the employer's actions were legitimate and nondiscriminatory. *Id.* Once defendant offers a nondiscriminatory reason, the presumption under *McDonnell Douglas* drops away. *Id.* at 465. The *Hazle* Court explained the analysis which then follows:

> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." . . . [A] plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination." [*Id.* at 465-466 (citations omitted).]

In other words, in the context of summary disposition, the plaintiff's disproof of the defendant's nondiscriminatory reason must "also raise[] a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 175; 579 NW2d 906 (1998).

It is undisputed that plaintiff belonged to a protected class and did not receive either position. Although defendant argued that plaintiff was not qualified for either position, defendant found plaintiff to be qualified enough to be interviewed for both positions. Our Supreme Court has held that in order to present a prima facie case of discrimination, a plaintiff does not have to show that she was at least as qualified as the successful candidate. *Hazle, supra* at 470. Therefore, for purposes of proving her prima facie case, it is arguable that plaintiff was minimally qualified for the positions. However, plaintiff did not satisfy the "ideal" criteria or qualifications sought by the hospital in filling the positions. We shall continue our analysis under the presumption that plaintiff was minimally qualified. Plaintiff also must show that defendant's decisions, if unexplained, gave rise to an inference of discrimination. For the physician recruiter position, defendant hired a younger male from outside the hospital to fill the position. For the social worker position, defendant hired a younger female from outside the hospital to fill the position. Accordingly, plaintiff presented a prima facie case of discrimination for both positions.

As plaintiff presented a prima facie case of discrimination, defendant had the burden of producing a nondiscriminatory reason for the hiring decisions. Defendant met this burden by presenting evidence reflecting that it hired the candidates for both positions based on their qualifications, which were believed to be superior to plaintiff's qualifications and which better

met the "ideal" criteria. Once defendant gave a non-discriminatory reason for its decision, the inference of discrimination raised under the *McDonnell Douglas* test dropped away.

Plaintiff thus had to show that defendant's reason for making its decision was a pretext for discrimination and that discriminatory intent or animus was a motivating factor in defendant's decision. To show that defendant's reason for its decision was a pretext for discrimination, plaintiff stated that she was more qualified for both positions. However, for both positions, defendant advertised that an ideal candidate would have a four-year degree. It was undisputed that the candidate for the physician recruiter position possessed a master's degree and that the candidate for the social worker position possessed a bachelor's degree in social work while plaintiff did not possess a four-year degree. The evidence in both situations indicated that defendant attempted to hire the most qualified candidate and that age or gender were not factors in making the hiring decision.

Plaintiff also argues that defendant's failure to follow a company policy of posting open positions internally before posting the positions externally showed that defendant's actions were a pretext for discrimination. We first find that the policy applied specifically to nursing and clerical positions, and there was evidence that the positions at issue did not fall within those categories. Therefore, the policy cannot support plaintiff's position. Furthermore, plaintiff fails to show how defendant's actions served as a pretext for discrimination based on plaintiff's age or gender. Plaintiff applied and was interviewed for both positions. In the end, defendant appears to have made its decisions based on who was most qualified for the positions, and there was no evidence that these decisions were based on age or gender. The policy does not suggest that defendant is required to fill a position internally if hospital employees who apply do not meet all of the desired criteria as listed by defendant.

Plaintiff next argues that the trial court erred when it granted summary disposition to defendant on her claim of age discrimination regarding her termination. We disagree. To show a prima facie case of age discrimination when a plaintiff is discharged from employment, a plaintiff must show that (1) the plaintiff was a member of a protected class, (2) the plaintiff was discharged, (3) the plaintiff was qualified for the position, and (4) the plaintiff was replaced by a younger person. *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997). To establish that she was qualified, a plaintiff must show that she was performing the job at a level that met the employer's legitimate expectations. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 369; 597 NW2d 250 (1999). In regard to the fourth prong, a plaintiff may also show that she was treated differently from other similarly situated employees who were not members of the protected class. *Id.*

In this case, plaintiff was a member of a protected class because of her age, and she was terminated from her employment. Defendant does not dispute that at the time of her termination, plaintiff was performing up to expectations, so she was qualified for purposes of presenting a prima facie case. With respect to the fourth prong, plaintiff was not replaced with a younger worker. Rather, the psychiatry department where she worked was closed. Plaintiff also did not present evidence of other similarly situated employees who were younger and who were treated differently. Plaintiff only argues that the psychiatry department did not really close. However, plaintiff admitted in her deposition that she did not have any evidence that the hospital board did not actually determine to close the psychology department, and she cannot point to anyone who has taken over her former duties. Plaintiff offered no evidence that suggested that the closing of

the department and her termination had anything to do with her age. Because plaintiff cannot meet the fourth prong to show a prima facie case of discrimination, the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff next claims that the trial court erred when it dismissed her claim for breach of contract and wrongful discharge. We again disagree. "Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle*, *supra* at 163-164 (citation omitted). However, an employee can rebut the presumption of employment at will by presenting proof of a contract provision for a definite term or a provision that forbids discharge absent just cause. *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). There are three ways a plaintiff can prove that such a contractual term exists: (1) proof of an actual contract term that allows discharge only for just cause, (2) an express written or oral agreement that is clear and unequivocal regarding job security, or (3) a contractual provision that is implied at law where "an employer's policies and procedures instill a 'legitimate expectation' of job security in the employee." *Lytle*, *supra* at 164, citing *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 615; 292 NW2d 880 (1980).

Plaintiff testified in her deposition that she did not have a contract that permitted only just-cause termination. Plaintiff argued that oral assurances made when she was hired that as long as she did her job well, she would have a job and assurances made by her supervisors that they would keep her employed constituted an oral agreement for just-cause employment. However, there was no evidence presented by plaintiff that these assurances were made during a negotiation for employment or with an intent to contract for just-cause employment. Plaintiff's testimony on this subject was vague and conflicting. Oral assurances must be clear and unequivocal and be more than just "an optimistic hope of a long relationship" to establish a just-cause employment contract. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 640; 473 NW2d 268 (1991). Plaintiff failed to meet her burden.

Plaintiff also argues that certain policies of defendant created a legitimate expectation of just-cause employment. In reviewing a legitimate-expectation claim, courts determine (1) what the employer has promised, if anything, and (2) whether the promise was '"reasonably capable of instilling a legitimate expectation of just-cause employment . . . ."' *Lytle*, *supra* at 164-165, quoting *Rood*, *supra* at 138-139. The only policy plaintiff argues in support of her legitimate expectation claim is a policy that defendant would post open clerical and nursing positions internally before recruiting externally. This policy has nothing to do with termination of employment, and it could not be reasonably capable of instilling an expectation of just-cause employment. Plaintiff also argues that defendant's violation of the policy is a cause of action itself. However, as stated above, the policy was not applicable to the positions at issue. Also, the policy does not suggest that defendant is required to fill a position internally if hospital employees who apply do not meet all of the desired criteria as listed by defendant.

Finally, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition regarding her claim under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*. We disagree.

MCL 423.503 states that an employer, who receives a written request from an employee, shall provide the employee an opportunity to review the employee's personnel record at a location reasonably near the employee's place of employment. MCL 423.504 allows an

employee to obtain a copy of the personnel record after the review described in MCL 423.503 has taken place or the employee demonstrates that she is unable to review the personnel record at the employer's location and requests a copy of the personnel record in writing.

On May 24, 2001, plaintiff's attorney wrote a letter advising defendant that he represented plaintiff and requesting that defendant produce plaintiff's employment file and personnel handbook or manual. Plaintiff did not present any evidence that she made a request to review her personnel file as she was required to do before she could request a copy under MCL 423.504. Plaintiff also did not offer any evidence that she demonstrated to the employer that she was unable to review her record at the employer's location. The letter to defendant only requested that defendant produce a copy of plaintiff's employment record. Because plaintiff did not first review her file under MCL 423.503 or give a written reason why she could not review the file at defendant's location, plaintiff did not comply with MCL 423.504. Because plaintiff did not comply with the statute, defendant was not under any obligation to reproduce plaintiff's personnel file when it received the letter from plaintiff's attorney. Therefore, the trial court did not err in granting summary disposition on this claim also.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell